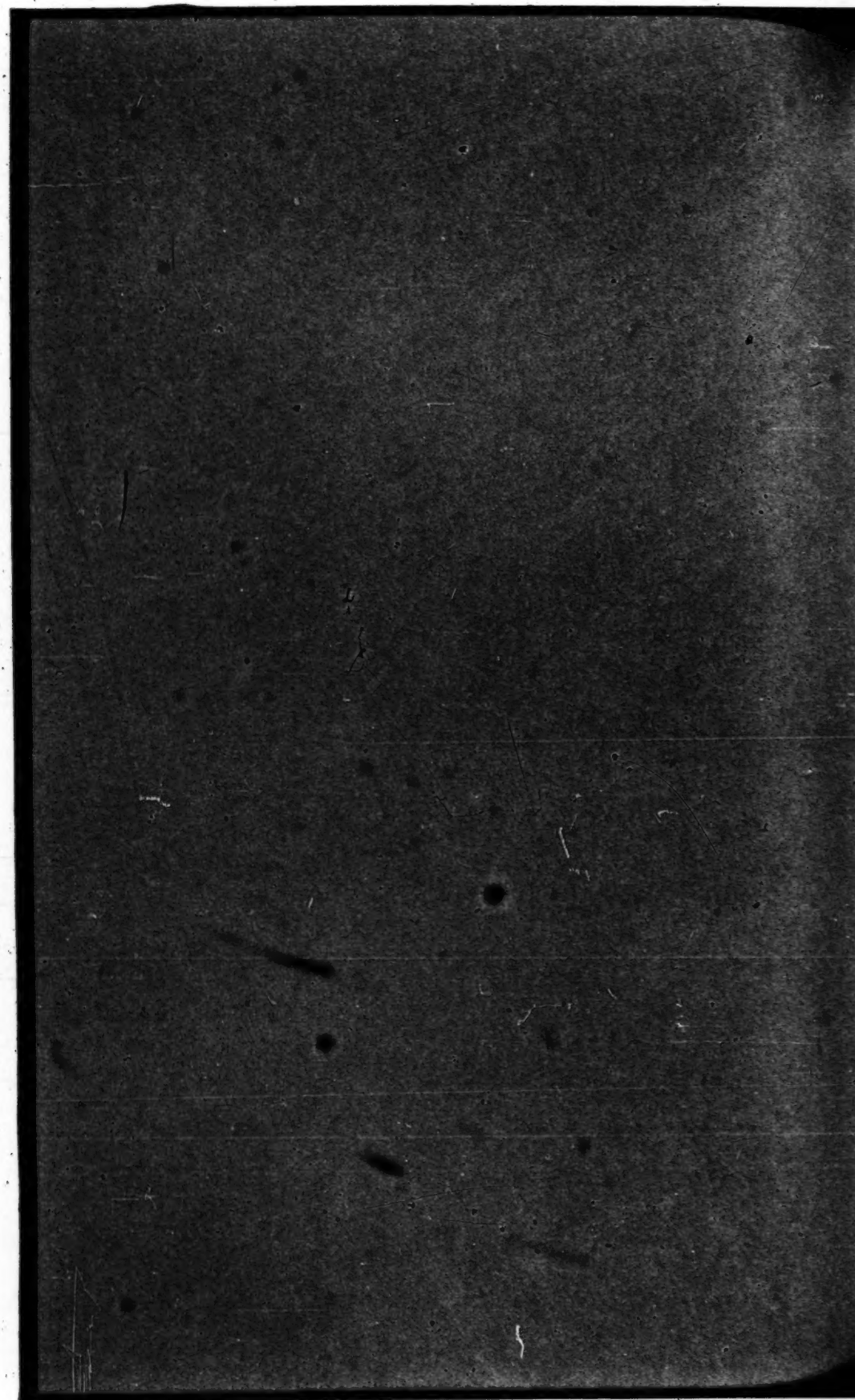

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

DAVID E. STRANGE,
Plaintiff,
v.
JAMES R. JAMES, Judicial Administrator, and THE STATE OF KANSAS,
Defendants.

Civil No. T-4713

(Filed March 5, 1971)

John E. Wilkinson, Topeka, Kansas, for Plaintiff.

Ernest C. Ballweg, Assistant Attorney General, Topeka, Kansas, for Defendants.

Before HILL, United States Circuit Judge, TEMPLAR and THEIS, United States District Judges.

HILL, Circuit Judge.

Plaintiff, Strange, brings this action before a three-judge panel of the United States District Court and asks the court to declare K.S.A. 1970 Supp. 22-4513 unconstitutional and to enjoin its enforcement.[1]

The statute in question is a provision under the Kansas Aid to Indigent Defendants Act which, in brief, pro-

1. The Kansas Aid to Indigent Defendants Act, which includes the provision in question, has been recently recodified into K.S.A. 1970 Supp. 22-4501 through 22-4415. When plaintiff commenced this action, Section 22-4513 was codified as K.S.A. 62-3113 (1969 Supp.). Hereafter reference will be made to the 1970 recodification.

vides that whenever any state expenditure is made under the Act to provide counsel or other defense services to any indigent defendant, the defendant shall be liable to the State of Kansas for a sum equal to such expenditure, and such sum shall be recovered, if necessary, by entering the amount of the expenditure on the judgment docket as a judgment against the defendant.[2]

The procedural facts of the case are stipulated, and those material to our disposition are as follows: Plaintiff was arrested and charged with first degree robbery under Kansas law. At his arraignment before a magistrate, he advised that official of his attempt to retain counsel and the hearing was continued. Thereafter, plaintiff appeared before the magistrate and indicated his need for representation and his willingness to accept court appointed counsel. The magistrate found that plaintiff was without funds to employ counsel and did appoint counsel pursuant to the Aid to Indigent Defendants Act. Thereafter, plaintiff again appeared before the magistrate, with his court

---

2. K.S.A. 1970 Supp. 22-4513 in pertinent part reads: "Whenever any expenditure has been made from the aid to indigent defendants fund to provide counsel and other defense services to any defendant, as authorized by Section 10, such defendant shall be liable to the state of Kansas for a sum equal to such expenditure, and such sum may be recovered from the defendant by the state of Kansas for the benefit of the fund to aid indigent defendants. * * *

"Should the sum demanded remain unpaid at the expiration of sixty (60) days after mailing the notice, . . . clerk shall enter the total amount thereof on his judgment docket and said total amount, together with the interest thereon at the rate of six per cent (6%) per annum, from the date of the expenditure thereof until paid, shall become a judgment in the same manner and to the same extent as any other judgment. . . . None of the exemptions provided for in the code of civil procedure shall apply to any such judgment, but no such judgment shall be levied against a homestead. * * *"

appointed counsel, and the original charge was reduced to the charge of pocket picking. Plaintiff was bound over to the Shawnee County District Court for trial and that court found the plaintiff to be financially unable to employ counsel and formally appointed counsel to represent plaintiff in that court. Plaintiff subsequently entered a voluntary plea of guilty which was accepted by the court, the imposition of sentence was suspended and plaintiff was placed on probation for a period of three years.

Thereafter, plaintiff's court appointed counsel made application for payment from the State Aid to Indigent Defendants Fund for services rendered. Then, for the first time, Section 22-4513 came to the attention of plaintiff and his court appointed counsel. The state paid $500 to plaintiff's court appointed counsel out of the fund, and pursuant to Section 22-4513 the Kansas Judicial Administrator requested plaintiff to reimburse the state within sixty days or a judgment in like amount would be docketed against plaintiff.

At the outset, we are confronted with defendants' motion to dismiss wherein defendants contend that plaintiff should assert his claim in a state court and that plaintiff will have the opportunity to present his claim to the state court when the state proceeds to enforce the judgment. We construe defendants' motion as a suggestion that this court abstain from deciding this case. However, on the authority of Zwickler v. Koota, 389 U.S. 241 (1967), we decline to abstain.[3] There is no lack of clarity in the state law and, as shall become apparent below, the statute is incapable of a narrowing construction which would render it constitutional.

---

3. *Cf.* Reetz v. Bozanich, 397 U.S. 82 (1970).

Plaintiff's most appealing contention is that enforcement of Section 22-4513 infringes upon his right to assistance of counsel because the statute has a chilling effect on the exercise of the right to counsel. Conversely, the question may be put whether the continued viability of the decision in Gideon v. Wainwright, 372 U.S. 335 (1963), requires the state to provide free court appointed counsel to those accuseds who, like plaintiff, are financially unable to employ an attorney.

Beyond question, the Kansas statute deters indigents from exercising their right to the assistance of counsel. The statute most assuredly puts the accused in the position of deciding whether he can afford to consult even with court appointed counsel. In practical effect, this statutory condition on an indigent accused's acceptance of court appointed counsel returns the indigent accused to the lawyerless position he occupied prior to the decision in Gideon v. Wainwright, supra. For if an accused has not the means to hire an attorney in the first instance, he will not be in a position to accept court appointed counsel when it merely means that he has at most ninety days grace in paying the cost of legal services rendered on his behalf.

The Supreme Court of California has been confronted with essentially the same situation. In that state it was the practice, as a condition to probation, an indigent had to agree to repay the state for the cost of court appointed counsel. The California court held, In Re Allen, 455 P.2d 143 (Cal. 1969), that such a burden or condition upon the exercise of the right to counsel is unconstitutional. As was aptly stated on page 144 in that decision, "[W]e believe that as knowledge of this practice has grown and continues to grow many indigent defendants will come to realize that the judge's offer to supply counsel is not the gratuitous offer of assistance that it might appear to be . . . . This knowl-

edge is quite likely to deter or discourage many defendants from accepting the offer of counsel despite the gravity of the need for such representation as emphasized by the court in *Gideon*, ... The government is without constitutional authority to impose a predetermined condition on the exercise of a constitutional right or penalize in some manner its use."

As was observed by the California court in Allen, supra, it is well settled that a statutory provision that conditions and thereby deters the exercise of constitutional rights may for that reason be unconstitutional, particularly when the hurdle that must be cleared to avail oneself of a fair criminal adjudication is financial and applies unevenly to indigents.[4] In United States v. Jackson, 390 U.S. 570 (1968), the Supreme Court considered the validity of a statute whose inevitable effect was to discourage assertion of the Fifth Amendment right not to plead guilty and to deter the exercise of the Sixth Amendment right to demand a jury trial. The court said, supra at 581-2: "If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional." And if the legislative objective is other than to deter the exercise of rights, the objective "[C]annot be pursued by means that needlessly chill the exercise of basic constitutional rights. The question is not whether the chilling effect is 'incidental' rather than 'intentional;' the question is whether the effect is unnecessary and therefore excessive."

---

4. E.g. Rinaldi v. Yeager, 384 U.S. 305 (1966); Draper v. Washington, 372 U.S. 487 (1963); Douglas v. California, 372 U.S. 353 (1963); Lane v. Brown, 372 U.S. 477 (1963); Griffin v. Illinois, 351 U.S. 12 (1955).

We must conclude that Section 22-4513 is unnecessary and therefore excessive. What can be more unnecessary than trying to recoup costs of counsel from an individual already adjudged to be an indigent and by definition unable to stand the very expense in question? In this light it is apparent that the statute needlessly encourages indigents to do without counsel and consequently infringes on the right to counsel as explicated in Gideon v. Wainwright, supra.

Since we believe that the statute in its present form is a needless burden or condition on the exercise of a constitutional right, our attention now turns to whether the statute can be construed in any way to eliminate its chilling effect. In answer to this question, it appears that as long as the statute in any way requires the indigent to repay the state for legal services, the statute will remain as an unconstitutional burden to the exercise of constitutional rights, as those rights were laid out in Gideon v. Wainwright, supra.

Unquestionably the guiding principle behind the Gideon decision was, "The financial ability of the individual has no relationship to the scope of the [constitutional] rights [to counsel] involved here," Miranda v. Arizona, 384 U.S. 436, 472 (1966). It is safe to say that the right to counsel is absolute and should not be fettered by the poverty of the accused because, as was indicated in Miranda v. Arizona, supra, the right to counsel does not mean that a defendant can consult with a lawyer only if he has the funds to obtain one. To maintain unimpaired the concept embodied in the Gideon decision, it appears necessary that the state pay for the indigent's legal counsel when the defendant cannot afford the cost. Anything less appears to be an impermissible impediment to the exercise of a constitutional right.

An examination of the Gideon decision must begin with the Supreme Court's declaration that, "[A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is *provided* for him."[5] Relying on that self-evident statement, the Supreme Court went on to hold that the Constitution requires that counsel must be provided in state trials for those accuseds too poor to provide their own counsel. Unquestionably the reasoning and decision in Gideon would be hollow verbiage if an indigent accused could be offered or "provided" counsel in such a way as to assure that he will reject court appointed counsel. But that is the effect of the Kansas statute when it extends counsel to an indigent accused under conditions making it unlikely that the accused will accept counsel.[6]

To this court, it is beyond question that the indigent's right to counsel as explicated in Gideon and the larger assurance of a fair trial implicit therein will not long endure unless the state provides counsel in a manner designed to assure that the indigent accused will in fact have counsel to represent him. Moreover, it is difficult if not impossible to see how the state can meet this obligation and at the same time provide for the recovery of legal expenses from indigents. Hence any construction of the Kansas statute which leaves intact the state's right to recover legal expenses from indigents is a construction which inevitably impinges upon and undermines the rights protected in Gideon.

---

5. Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (emphasis added).

6. "Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them." Miranda v. Arizona, 384 U.S. 436, 491 (1966).

There is no doubt that the holding in Gideon requires that an indigent defendant be provided counsel at the expense of the state. Mr. Justice Harlan, upon discussing another problem in his dissent to Desist v. United States, 364 U.S. 244, 268 (1968), capsulized Gideon as having "already established the proposition that the state must provide free counsel to indigents at the criminal trial." Numerous state high courts have extrapolated from the right to counsel the principle that an indigent is entitled to have counsel appointed to conduct his defense at the expense of the people.[7] The Supreme Court of New Hampshire squarely faced the problem we face here and struck down its statute on the authority of both the decisions of the United States Supreme Court and on the authority of the state constitution which, like the Sixth Amendment, provides for the absolute right to counsel.[8] Consequently, we believe that the inevitable effect of the Kansas statute which in anywise seeks to recover defense costs from indigents is to unconstitutionally burden and suppress the exercise of the constitutional right to counsel.

Defendants argue that the facts in this case do not disclose that plaintiff was deterred from accepting court appointed counsel insofar as plaintiff actually did accept court appointed counsel. However, whether the accused in this case accepted or rejected counsel does not remove the fact that the provision for recovering legal expenses is a burden and condition on the exercise of the right to counsel and thereby has some chilling effect on the exercise of the right. The defendants also contend that the

---

7. E.g. Anderson v. State, 239 A.2d 579 (Md. 1968); People v. LeMarr, 136 N.W.2d 708 (Mich. 1965); State v. Holiday, 155 N.W.2d 378 (Neb. 1967); State v. Rush, 217 A.2d 441 (N.J. 1966); Commonwealth v. Johnson, 236 A.2d 805 (Pa. 1968).

8. Opinion of the Justices, 256 A.2d 500 (N.H. 1969).

Kansas statute has a parallel in the Criminal Justice Act, 18 U.S.C. §3006A(f). Even if this is an accurate appraisal of the Federal statute, it is not relevant since we are not called upon to consider the validity of the Criminal Justice Act.

Finally, defendants' analogy between the recovery of appointed counsel's fee and the state's permissible recovery of the costs of a criminal prosecution fails because regarding the state's permissible recovery of the latter costs, there is no constitutional right analogous to the right to counsel which is infringed.

We conclude that K.S.A. 1970 Supp. 22-4513 is unconstitutional and an injunction will issue against its enforcement.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-11

JAMES R. JAMES, Judicial Administrator, and
THE STATE OF KANSAS,
Appellants,

vs.

DAVID E. STRANGE,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

APPELLEE'S MOTION TO DISMISS APPELLANTS' APPEAL AND TO AFFIRM THE DECISION AND JUDGMENT OF THE THREE-JUDGE DISTRICT COURT

JOHN E. WILKINSON
1000 First National Bank Bldg.
Topeka, Kansas 66603
Court-Appointed Attorney for David E. Strange

E. L. MERRIHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

TREATISES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-11

JAMES R. JAMES, Judicial Administrator, and
THE STATE OF KANSAS,
Appellants,

vs.

DAVID E STRANGE,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

APPELLEE'S MOTION TO DISMISS APPELLANTS' APPEAL AND TO AFFIRM THE DECISION AND JUDGMENT OF THE THREE-JUDGE DISTRICT COURT

The question presented by this appeal has been in effect previously decided by this Court. The States have the responsibility (or burden) to furnish counsel to an accused, just as they have the responsibility (or burden) to furnish an agency to prosecute alleged law violators.

INTRODUCTION

On September 24, 1971, Counsel for appellee received a letter from the U. S. Supreme Court Clerk's Office dated September 20, 1971 requesting that counsel for appellee-plaintiff file a response to the Jurisdictional Statement of appellants which statement is a part of an appeal filed and docketed in the U. S. Supreme Court on July 1, 1971.

Appellants are appealing from the decision and judgment of the Three-Judge District Court which did on April 19, 1971 enjoin the enforcement of K.S.A. 1970 Supp. 22-4513 due to the plain fact that said statute violated a basic federally guaranteed right to counsel. The Court found, as a matter of fact, that Section 22-4513 is unnecessary and therefore excessive and thus needlessly encourages indigents to do without counsel and consequently infringes on the right to counsel.

BACKGROUND STATEMENT

Appellee's counsel has reviewed appellants' Jurisdictional Statement; there is no quarrel with what is stated, for the most part, in the sections denominated *Introduction, Opinion Below, Jurisdictional Statement* (again), *Statute Involved,* or *Question Involved.*

However, on page 6, appellants state that appellee—the accused in Shawnee County District Court—entered a plea of guilty to violating certain statutes, "*after being fully advised by counsel*". This is simply not the case. On page A1 of the Appendix, the opinion of Circuit Judge Delmas C. Hill is set out. At page A3, Judge Hill states that K.S.A. 1970 Supp. 22-4513 did not come to the attention

of plaintiff and his court-appointed counsel until after the plea of guilty and after a considerable amount of legal service was rendered to this defendant. The Shawnee County Magistrate Judge, the Shawnee County District Court Judge, and his court-appointed counsel never advised the accused of the ramifications of accepting court-appointed counsel. When counsel for appellee prepared his application for payment from the State Aid to Indigent Defendants Fund, he discovered that the accused—then parolee—was going to have a judgment against him for the legal services rendered in an amount over which the accused had no control.

At that point of time, court-appointed counsel decided to proceed to collect a fee from the State and decided to contest the constitutionality of the statute which allowed the State to procure a judgment against the accused.

In the Three-Judge District Court proceedings, the points raised were:

1. Did the Magistrate Court of Shawnee County, Kansas and the District Court of Shawnee County, Kansas fail to give this plaintiff "due process" notice of the effect that acceptance of court-appointed counsel would have—that a judgment would be rendered against plaintiff for whatever sum the State would pay his court-appointed counsel?

   (a) What constitutes "due process" notice? (See *Sniadach* v *Family Finance Corporation*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed. 2d 349.)

   (b) Does failure to give notice render any proposed judgment void?

2. If due process notice had been afforded this plaintiff in the State Court proceedings—that is, notice that the plaintiff's acceptance of court-appointed counsel would result in a judgment against him for an undetermined amount—could the statute operate

in such a way as to not result in a denial to this plaintiff of the equal protection of the laws as guaranteed by the Fourteenth Amendment as equal protection relates to the free exercise of a right guaranteed by the Sixth Amendment to the United States Constitution?

(a) Would acceptance of court-appointed counsel deny the indigent accused of equal protection of the law?

(b) Would a refusal to accept court-appointed counsel deny the indigent accused of equal protection of the law?

Now, even though it was admitted that no notice or hearing was held on the effect of accepting court-appointed counsel, the Three-Judge District Court wanted to meet the problem of whether or not the statute could be made to function constitutionally: at least one other case asking for a Three-Judge District Court was filed in Wichita, others were being prepared. Since this case was filed, briefed and argued (in near record time) the Three-Judge District Court, in the interest of conserving judicial time, proceeded as if due process notice had been afforded this plaintiff-appellee—in the State Court proceedings.

ARGUMENT AND AUTHORITIES

The State in its Jurisdictional Statement is tenuous. It's difficult to follow and to understand for those of us who are equalitarians. At page 10, it is stated, ". . . The effect of the District Court's decision in this case is to treat the indigent unequally. . . .

. . . the decision in this case treats the indigent defendants among all other defendants in a far superior and unequal position."

One has to abandon his oath to uphold the constitution to be persuaded by such statements. We all pay taxes in some form or another to run our various branches of government: our Congress, our President, our Judiciary, our Legislatures, our Governors, our Local Courts, agencies of all kinds. These federal, state and local governments are designed to be efficient in affording each and every one of us equal protection of the law, due process of law, freedom of the press, freedom of speech, freedom to worship as we please, freedom from unreasonable searches of our person and unreasonable seizures of our personal effects. Our governments, fundamentally, justify their existence by insuring each and every one of us basic rights—the right against self-incrimination, the right to confront our accusers, the right to cross-examine our accusers, the right to subpoena witnesses on our own behalf, the right to a jury trial, and the right to have the same variety of effective counsel as a rich man would have. As long as our governments do this—our great American experiment has hope—democracy will be in action.

But the struggle for basic human rights is continual. It never ends. There is a feeling on the part of some that

the poor and the oppressed must not be given hope, must not be given faith, must not be given charity. The problem for those people is that our populace, for the most part, even though in a dependent state, has become educated: educated to basic rights. We must uphold the dignity of man: the country will be fraught with turmoil as long as basic rights are defeated by subtle provisions of law, such as we have before the court in the instant situation. We must not allow the poor and the unfortunate to drown on the Constitutional Rights plank—the very plank by which they saved themselves.

The Appellants' whole argument relates to a different standard than the one required to be used. In *Griffin* v *Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956), the majority held that "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has." (351 U.S. at 19.) The standard must relate to the rich man. The appellee-plaintiff here was and is an indigent. He was an indigent at the time of his arrest, he was an indigent at the time counsel was appointed for him, and he remains an indigent today. As pointed out by Mr. Justice Douglas in *Douglas* v. *California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed. 2d 811 (1963):

> "There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, or the indigent already burdened by a preliminary determination that his case is without merit, is forced to shift for himself. The indigent where the record is unclear or the errors are hidden, has only the right to a meaningless appeal." (372 U.S. at 358.)

Again, Courts must be bastions of freedom; not fraught with subtle ways to prevent the exercise of basic rights.

If the State's theory is correct, the indigent would have to consider several matters in making a decision as to whether to accept court-appointed counsel. One matter would be whether he wanted to subject himself to a judgment, in and of itself. Another matter would be the amount of the judgment and interest thereon. But more basically, he would have to decide whether he really wanted a jury trial, whether he really wanted to testify, whether he really wanted to confront the witnesses accusing him, whether he really wanted to cross-examine those witnesses, whether he really wanted to subpoena witnesses on his own behalf, whether he really wanted to contest the validity of his arrest and whether he really wanted to avail himself of other constitutional rights. To get right to the point, he would have to determine whether he really wanted counsel.

In *Gideon* v. *Wainwright*, (1963) 372 U.S. 335, 344, 83 S.Ct. 792, 796, 9 L.Ed. 2d 799, the United States Supreme Court stated that not only certain precedents, to which it alluded, but

> "also reason and reflection require us to recognize that in our adversary system of criminal justice, any person hailed into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.

> The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."

Whether the accused *accepted* court-appointed counsel or whether he *refused* court-appointed counsel is immaterial. The plain fact is the statute is an impediment to his right to counsel. It imposes upon him matters which he should not be concerned about in the circumstances in which he finds himself. To allow the statute to operate would deny him equal justice or equal protection of the law. The U. S. Supreme Court has repeatedly said that a poor man is entitled to the same privileges in court as is a rich man. See *Griffin* v *Illinois,* 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956); *Douglas* v *People of the State of California,* 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed. 2d 811 (1963); *Lane* v *Brown,* 372 U.S. 477, 83 S.Ct. 768, 9 L.Ed. 2d 892 (1963); *Draper* v *Washington,* 371 U.S. 487, 83 S.Ct. 774, 9 L.Ed. 2d 889 (1963); *Rinaldi* v *Yeager,* 384 U.S. 305, 86 S.Ct. 1497, 17 L.Ed. 2d 577 (1966); *Williams* v *Oklahoma City,* 395 U.S. 458, 89 S.Ct. 1918, 23 L.Ed. 2d 440 (1969).

However, a case most directly in point to our situation at hand is *In re Allen,* 78 Cal. Rptr. 207, 455 P.2d 143 (1969). In that case a defendant, Allen, pled guilty in the Superior Court of San Mateo, California, to the offense of possessing a restricted dangerous drug without prescription. The defendant's sentence was suspended and she was placed on probation. One of the conditions of the defendant's probations was that she "reimburse the County of San Mateo

for court-appointed counsel through the probation department." This condition of probation was imposed apparently pursuant to a clause in the California Penal Code which provided that a court may impose any "reasonable conditions it may determine are fitting and proper to the end that justice may be done. . ."

Subsequently the defendant applied for a writ of habeas corpus challenging the requirement of reimbursement condition in her probation. The Supreme Court of California unanimously ruled that this condition of the defendant's probation was invalid. In its opinion the Court held that a condition of probation requiring reimbursement for a court-appointed counsel "constitutes an impediment to the free exercise of a right granted by the Sixth Amendment." The Court pointed out at Page 144:

> "We may take judicial notice that judges in San Mateo County and in certain other counties have made use of the method utilized in the case at hand of reimbursing the county's treasury for funds expended in supplying counsel for indigents. Although this concern for the financial burden imposed upon the counties for such costs is commendable we believe that as knowledge of this practice has grown and continues to grow, many indigent defendants will come to realize that the judge's offer to supply counsel is not the gratuitous offer of assistance that it might appear to be; that, in the event the case results in a grant of probation, one of the conditions might well be the reimbursement of the county for the expense involved. This knowledge is quite likely to deter or discourage many defendants from accepting the offer of counsel despite the gravity of the need for such representation as emphasized by the court in *Gideon*, supra. Although in the instant case there is no indication in the record that petitioner was discouraged from exercising her constitutional right to counsel for, in fact, she requested and received counsel, neither does the record show that she was forewarned of the possibility

that she might become indebted to the county for the cost of such service. The fact that such knowledge might have deterred her, and could well deter others, gives rise to our concern as to the validity of such a condition of probation. The government is without constitutional authority to impose a predetermined condition on the exercise of a constitutional right or penalize in some manner its use."

The Court also noted that since a defendant would not normally have any part in setting the amount to be reimbursed the "blank check" approach authorized by allowing reimbursement to be a condition of probation might further detain defendant's acceptance of appointment of counsel. The Court concluded that authorizing the meeting of deficits in court and county justice by making probation of defendant a source of revenue may well "divert or dilute the attention the judge must give to the specific considerations which the law requires him to have in mind in the sentencing process."

In the case before us, we do not have the problem of making a reasonable classification among the various people that are accused with crime. This statute applies to any and all people whether the accused is convicted, whether the matter is dismissed, or whether he pleads guilty. This fact simplifies our problem. That means that there is no need for the State to interpret this statute. It means that the only matter to be considered is whether the application of the statute in some way infringes upon the accused's federally guaranteed rights. It leaves only the federal question to be considered.

K.S.A. 1970 Supp. 22-4513 (b) cannot operate in such a manner as to not result in the denial to this plaintiff of the equal protection of the laws. As stated in *Allen*, supra,

"It would appear utterly inconsistent to advise a defendant of his entitlement of the free service of coun-

sel and later to exact repayment through the medium of a condition of probation."

Miranda v *Arizona,* (1966) 384 U.S. 436, 86 S.Ct. 1602, 17 L.Ed. 2d 694, makes clear that where

> "rights secured by the constitution are involved, there can be no rule making or legislation which would abrogate them." (p. 499)

K.S.A. 1970 Supp. 22-4513 abrogated the free exercise of the right of the accused guaranteed by the Sixth Amendment of the United States Constitution.

In the *Opinion of the Justices, No. 5978,* 256 A.2d 500 (1969), the Supreme Court of the State of New Hampshire considered a proposed provision in the New Hampshire law making indigent defendant personally responsible for the payment of ten percent of the legal fees paid court-appointed counsel: such persons were to pay a minimum of $5.00 but were not responsible for payment in excess of $20.00. The Court held the law invalid: payment of counsel should be made without reference to it. The New Hampshire justices observed "it doesn't seem illogical that a defendant who has or acquires the ability to pay his attorney should do so, but that the difficulty lies in making such reimbursement provisions in such a manner that does not violate constitutional requirements". (page 502) The justices cited *Rinaldi* v *Yeager,* supra, and *In re Allen,* supra.

A law review comment entitled "Reimbursement of Defense Costs as a Condition of Probation for Indigents", 67 Mich. L. Rev. 1404 (1969), is in accord with the contentions advanced by the plaintiff-appellee. At page 1413 the writer points out exactly what the problem is: if convicted indigents are required to reimburse the state for the cost of their defense they may choose to forego

counsel and other legal assistance in the first instance in order to avoid the potential burden of repayment. The writer observed that "such a requirement exerts what the Supreme Court has characterized, in other contexts, as a 'chilling effect' on the defendant's freedom to exercise his constitutional rights". The writer draws a parallel to the proposition before the United States Supreme Court in *U. S.* v *Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed. 2d 138 (1968). There the Court held unconstitutional the section of the federal kidnapping act which provided that the death penalty for kidnapping could be imposed only by a jury verdict. The writer said:

> "Since a defendant faced the possibility of death with a jury trial but not with a trial before a judge, the Court found that the statute violated the due process clause of the Fifth Amendment because it discouraged unnecessarily the defendant's exercise of the Sixth Amendment right to trial by jury and his Fifth Amendment right to plead not guilty. Similarly the requirement that an indigent defendant reimburse the State for the cost of his defense exerts a chilling effect on the exercise of his constitutional rights." (See page 1413.)

The State makes reference to *Rinaldi* v. *Yeager*, 384 U.S. 305, 86 S.Ct. 1497, 16 L.Ed. 2d 577 (1966). From the beginning I have cited this case for two reasons: (1) the procedure invoked therein; and (2) the actual holding struck down the requirement of recoupment on the cost of a transcript on the grounds that such requirement denied one of equal protection. Mr. Justice Potter Stewart made some statements dealing with equal protection as that clause relates to reasonable classifications. Mr. Stewart made no statements anywhere, in my opinion, dealing with the unfettered right to counsel as that issue was settled March 20, 1963 in *Gideon*. In the *Rinaldi*

case, the Court was dealing with, again, unreasonable classification; we are dealing here with the exercise of a basic right of a person charged with a serious crime.

The sanctity or inviolability of the Sixth Amendment as it relates to serious offenses was not exactly fast in coming. Now, after *Gideon*, we the people can say that we have a federally guaranteed right to counsel whether we are charged in State or Federal Court.

One must remember that there is no contest pertaining to the Court's finding of indigency. Appellants' argument speculates about transfer of property to acquire a status of indigency: there are ways of dealing with such problems if they arise. In the instant case, David Strange has made good on his probation but has had a marginal existence. There has never been a time where I've felt that the public interest would have been served or that he would have been better served by having him subjected to a judgment. The money spent in acquiring and levying on judgments against indigents would be better spent on a thousand and one other things—rehabilitation, schooling, better defense, better prosecution, and other priorities.

MOTION

For all of the foregoing reasons, appellee hereby motions this Court to dismiss appellants' appeal and to affirm the decision and judgment of the Three-Judge District Court.

Respectfully submitted,

JOHN E. WILKINSON
1000 First National Bank Bldg.
Topeka, Kansas 66603
Court-Appointed Attorney for David E. Strange